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No. 6

In the Supreme Court of the United States

October Term, 1948.

GRAND RIVER DAM AUTHORITY, a Public Corporation,
Petitioner,

vs.

GRAND-HYDRO, A Private Corporation, Respondent.

Petition for Rehearing and Supporting Brief.

QUINCE E. BOYDSTUN,

Vicks, Oklahoma,

DELMAS E. MARTIN,

Tulsa, Oklahoma,

ROBERT MARSH DAVIDSON,

Tulsa, Oklahoma,

Attorneys for Petitioner.

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IN THE SUPREME COURT OF THE UNITED STATES.
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GRAND RIVER DAM AUTHORITY, a Public Corporation,
Petitioner,

vs.

GRAND-HYDRO, A Private Corporation, *Respondent.*

P E T I T I O N f o r R E H E A R I N G .

To the Honorable FRED M. VINSON, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

The petitioner, Grand River Dam Authority, respectfully petitions the Court for a rehearing of this cause and upon the rehearing to withdraw its opinion entered on the 22nd day of November, 1948, and enter judgment reversing the Oklahoma Supreme Court in this cause, for the following reasons and upon the following grounds:

1. The Court has misinterpreted the theory on which the State Supreme Court decided this case and has based its affirmance of that decision upon a theory in conflict with the express declaration of the State court.

2. The Court has overlooked the character of condemnation proceedings under Oklahoma law and erroneously

held in effect that such proceedings are governed by the usual rules of pleading in civil actions.

3. The Court has overlooked the local laws under which the right to obstruct the flow of Grand River and utilize the waters thereof for power production is not appurtenant to or a part of the riparian lands and does not pass to a grantee under an ordinary conveyance of such lands.

4. The Court erroneously affirmed the judgment of the Supreme Court of Oklahoma recognizing and allowing water-power value of Grand River to the respondent who, by reason of law, did not have and could not acquire any lawful claim thereto, thereby requiring the petitioner, a licensee of the United States under the Federal Power Act, to pay the respondent for water power value in the guise of land value; the use of which lands for power purposes could only be granted by the United States; that this Court, by affirming said decision of the Oklahoma Supreme Court, has not given proper consideration to or protected the right of the petitioner under Federal law to obstruct the flow of Grand River and utilize the water power therein for the production of electric power.

Dated this 4th day of December, 1948.

QUINCE B. BOYDSTUN,
Vinita, Oklahoma,

DELMAS E. MARTIN,
ROBERT LEANDER DAVIDSON,
Tulsa, Oklahoma,

Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR REHEARING.

The Court has misinterpreted the theory on which the State Supreme Court decided this case and has based its affirmance of that decision upon a theory in conflict with the express declaration of the State court.

This Court, in its opinion, quotes from the opinion of the Supreme Court of Oklahoma rendered on the first appeal the general rule for the measurement of damages as stated in the *Creekmore* case but it makes no mention of and seems not to have considered the statement of that court immediately following the part quoted which qualified the general rule as follows:

"However, it is urged that the law announced in the above case does not entirely cover the situation here presented. It is said that the rule may apply generally to all uses to which the condemnee or his grantee at a free sale may lawfully employ the land, but does not apply in those instances where, as here, the condemnee or his ordinary grantee would have no legal right to use the land for the purpose for which the condemnee now urges as an element of compensation.

"We agree that the rule for the measure of compensation as announced in the Creekmore case applies only to those adaptable uses to which the condemnee or his ordinary grantee may lawfully place the land."

The court held in that opinion that the respondent had the lawful right under its State permit to place its lands to use as a dam site for impounding and utilizing the waters of Grand River for the production of electric power and energy. The court refused to accept the petitioner's contention that the State permit was void for the reason that no judicial decree by a court of competent jurisdiction had

been entered determining the rights of all parties along the stream to use the waters thereof as provided by Title 82, O. S. A., Secs. 12, 13 and 14, which had been held in *Owens v. Snyder*, 52 Okl. 772, 153 Pac. 833, to be a condition precedent to the authority of the commission to issue a permit. The court held that the *Owens-Snyder* case did not apply because of the passage by the Oklahoma Legislature of the Act of March 23, 1927,¹ and that said permit was valid when issued and in force and effect on the date of taking of the dam site lands. The court said:

“The purpose of the license was to provide for a public service within eight years. It was nothing less than a franchise for that purpose, and it had not been abandoned, nor had it expired by its own limitation. And it had not been terminated by judicial decree.”

The contest in the trial court had been over the validity of the respondent's State permit under State law. When the case was returned to the trial court for a second trial, new evidence was offered by petitioner showing that the respondent never filed a Declaration of Intention with the Federal Power Commission or obtained a license from that Commission to construct or operate a project of any kind on Grand River; showing that the petitioner had on December 15, 1937, filed its Declaration of Intention with the Federal Power Commission, on the hearing of which the Commission found that the Grand River was such a stream as Congress has jurisdiction over under the Commerce Clause; that petitioner's proposed project would affect the navigable capacity of the Arkansas River to which it was tributary, and, consequently, affect interstate commerce; that the project was in the public interest for developing and improving navigation and showing that the Authority

1. Par. 7, Sec. 3, Okla. Sess. Laws 1927; 82 O. S. A., Sec. 482.

thereafter filed its application for a license to construct its proposed project, which was granted by the Federal Power Commission on July 26, 1939, effective January 1, 1939. The petitioner then contended that respondent's State permit was void because it was issued after Congress had assumed exclusive jurisdiction over the flowage of Grand River and at a time when the State laws under which the permit had been issued were inoperative because of their conflict with Federal law; that under such circumstances the respondent's State permit could not constitute any authority for the respondent to lawfully use its lands for dam site purposes; that the right to obstruct the flow of Grand River could be obtained only through compliance with the Federal Power Act; that the right to obstruct the flow of the river was essential to the use of the lands as a dam site for a hydroelectric project, and that the respondent had not acquired such right under Federal law and could not on the date of taking have acquired such right because the petitioner had been granted by the Federal Power Commission the exclusive right to obstruct the flow of the river and to utilize the waters for power production at the site of the respondent's lands for a period of fifty years.

When the case reached the State Supreme Court on the second appeal, the petitioner urged upon that court the same contention it had made in the trial court. The respondent, in its brief, (Tr., p.),² advanced and urged upon the court the following contention:

"The rights and duties of the Authority, however, in the case at bar are controlled by the provisions of the Federal Power Act, Title 16, U. S. C. A., Sec. 803.

2. The respondent's brief in the State Supreme Court is contained in the Transcript on file in the Clerk's office of this Court but was omitted from the printed Record by stipulation of attorneys.

It provides that Federal licensees 'shall be liable for all damage occasioned to the property of others by the construction, maintenance or operation' of the licensed project, and Section 821 of the same title provides:

'Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective states relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, *or any vested right acquired therein.*'

'Section 814^{2a} of the same title provides that all licenses are required to be 'conditioned upon acceptance by the licensee of all the terms and conditions of this act.' When the Authority accepted its Federal license therefor it agreed to pay for all damages sustained by landowners as a result of the development of the project or the taking of the lands for the purpose provided in the permit or license and agreed further to pay for any damage to or the taking of 'any vested right acquired therein' from the State, and to do so in accordance with local law."

The respondent sought to avoid the force and effect of petitioner's contention by claiming that its State permit was still valid and effective under Federal law. While the State Supreme Court does not mention in its opinion Section 821 of Title 16, U. S. C. A. (Sec. 27 of the Federal Power Act), or the contention of respondent with respect thereto, it seems reasonable to conclude that the court accepted the respondent's contention because it reaffirmed as the law of the case its former holding that the respondent's State permit authorized respondent to use its lands for dam site purposes and specifically held that the Federal

2a. Should read Section 799, Title 16, U. S. C. A.

Power Act contained a provision³ requiring the petitioner to pay all damages to the property of others caused by the construction, operation, and maintenance of its project. The State court said:

“Although the Authority had been granted a license by the Federal Power Commission granting it the exclusive right to use the 417-acre tract as a dam site, it could not thereby take private property without just compensation. Nor was the issuance of such license intended to have that effect because the plain provision requires the licensee to pay all damages to the property of others caused by the construction, operation and maintenance of the project. In addition, the Federal Power Commission based its authority to take jurisdiction upon a finding of fact that the construction and operation of the project ‘as proposed by the declarant will affect navigable stages of the Arkansas River, a navigable water of the United States, to which said Grand River is tributary.’ The commission would have no authority whatever if the dam site were used for the construction of such a dam that the navigability of the Arkansas River would not be affected.”

It is perfectly clear that the Supreme Court of Oklahoma adhered to its former holding that “the rule for the measure of compensation as announced in the *Creekmore* case applies *only* to those adaptable uses to which the condemnee or his ordinary grantee may lawfully place the land,” and it seems reasonable to assume that the court considered that the right of the respondent to use its lands for dam site purposes under its State permit was in harmony with the provisions of the Federal Power Act and the petitioner’s license thereunder. If this is the correct theory of the State court, its holding is in direct conflict

3. Sec. 10(c), Federal Power Act, 16 U. S. C. A., Sec. 803.

with the decisions of this Court in the *First Iowa Hydro-Electric Cooperative* case⁴ and the decisions of several Circuit Courts of Appeals⁵ in which certiorari was denied by this Court, and the decision of the United States Circuit Court of Appeals for the Fifth Circuit in *Georgia Power Co. v. Federal Power Commission*, 152 F. (2d) 908.

This Court, in its opinion, says that:

"Accordingly, if the correct interpretation of the law of Oklahoma is that, in order for the respondent to introduce evidence of the value of the land for a dam site the respondent must show not only that the land is reasonably and lawfully usable for that purpose, but also that the respondent itself holds a valid state permit or federal license for the construction of the dam on that land, then it is clear that the evidence would not be admissible."

This Court then says:

"However, the Supreme Court of Oklahoma has settled this issue in favor of the respondent by holding that such a permit or license is not necessary in order for the evidence to be considered."

It is frankly submitted that this statement of the Court is contrary to the express statement of the State court that:

"The rule for the measure of compensation as announced in the *Creekmore* case applies *only* to those adaptable uses to which the condemnee or his ordinary grantee may lawfully place the land."

The language of the court is plain, explicit, and unambiguous.

4. 328 U. S. 152, 90 L. ed. 1143.

5. *Wisconsin Public Service Corp. v. Federal Power Commission*, 147 F. (2d) 743, certiorari denied June 18, 1945, 89 L. ed. 1996; *Niagara Falls Power Co. v. Federal Power Commission*, 137 F. (2d) 787, certiorari denied November 22, 1943, 88 L. ed. 477, rehearing denied June 5, 1943, 88 L. ed. 478; *Pennsylvania Water and Power Co. v. Federal Power Commission*, 123 F. (2d) 155, certiorari denied February 16, 1942, 86 L. ed. 1205.

nous. It leaves no room for interpretation or conclusion. If the right of use does not exist, adaptability cannot be considered. Under the statutes of Oklahoma ownership of the riparian lands does not carry with it any right to use the waters of the river for power production. The respondent has never acquired such right under Federal law through compliance with the provisions of the Federal Power Act. The respondent has never claimed such right of use by reason of its ownership of the riparian lands, or by reason of compliance with the Federal Power Act. However, it has at all times recognized the necessity of establishing such right of use in order to have the adaptability of its lands for such use considered in determining just compensation. In order to establish such right of use, the respondent offered in evidence its State permit and the proceedings under which it was issued and claimed the right of use under said permit. The State Supreme Court sustained the validity of that permit and held that it provided the necessary right of use to entitle the respondent to have the adaptability of its lands for dam site purposes considered under the rule announced by the court for the measurement of compensation. The court held the permit was valid notwithstanding two former decisions of the Court⁶ which held that the Conservation Commission had no jurisdiction to issue a permit until there had been a determination by a court of competent jurisdiction of the appropriated and unappropriated waters of the stream. There had been no such adjudication until the 14th day of February, 1938, and the permit had been issued on August 29, 1931. The Court's holding was on the theory that the Act of 1927 authorized the issuance of such a permit without such adjudication. The Court also held the permit was

6. *Owens v. Snyder*, 52 Okl. 772, 153 Pac. 833; *Gay v. Hicks*, 33 Okl. 675, 124 Pac. 1070.

valid in spite of the fact that the District Court of Mayes County, Oklahoma, had finally adjudicated, in an action to which both the respondent and petitioner were parties, that the permit was void *ab initio* because there had been no such adjudication. The Court refused to treat that judgment of the court as *res judicata* because of the provision in the assignment of the respondent's permit that if the lands of the respondent were acquired by the petitioner by condemnation, "the value thereof or damage thereto shall be ascertained and determined as though this assignment and conveyance had never been made," although the petitioner had alleged in said action that said permit was void and had no force or effect because issued by the Conservation Commission before there had been an adjudication by a court of competent jurisdiction of the appropriated and unappropriated waters of the river (R. 212), and the respondent had filed a reply admitting the allegations of the petitioner (R. 218). The State court has clearly held that in order to have the adaptability of its land for dam site purposes considered, the respondent must have the right to use its lands for that purpose and that the State permit issued to the respondent by the Conservation Commission on August 29, 1931, provided the respondent with such right of use on the date of taking.

The most reasonable, and it might be said the only permissible explanation of the reason why the State Supreme Court so ruled on the second appeal, is that the State Supreme Court was of the opinion that the State permit is not inconsistent with or contrary to the provisions of the Federal Power Act or the provisions of petitioner's license from the Federal Power Commission, as contended by respondent in its brief in the State court. If this is the correct rationalization of the decision of the State Supreme Court, its ruling

allowing consideration of adaptability for dam site use in fixing just compensation is contrary to the majority opinion of this Court in this case and the holding of this Court in the *First Iowa Hydro-Electric Cooperative* case.

Character of Condemnation Proceedings Under Oklahoma Law.

The Court seems to consider this proceeding in condemnation as a civil action governed by the ordinary rules of pleading and that the petitioner can not avail itself of the benefits of its Federal license without amending its petition in condemnation and alleging specifically the granting of its Federal license by the Federal Power Commission and petitioner's reliance thereon as a bar to the allowance of compensation based on the adaptability of the land for dam site purposes. This view of the nature of the condemnation proceedings under Oklahoma law is erroneous. The Supreme Court of Oklahoma holds that condemnation proceedings under local law are not actions at law or suits in equity, but are special proceedings *in rem*,⁷ which provide an adequate and exclusive remedy for the taking of private property for public use.⁸ It is generally held that condemnation proceedings are special in character and strict rules of pleading do not apply.⁹

The procedure in condemnation proceedings is prescribed by statute in Oklahoma.¹⁰ The statutes provide in effect that when the land cannot be acquired by purchase,

7. *Oklahoma City v. Wehs*, 185 Okl. 369, 91 P. (2d) 1077, 123 A. L. R. 662; *Epperson v. Johnson*, 190 Okl. 1, 119 P. (2d) 818; *Grand River Dam Authority v. Grey*, 192 Okl. 547, 138 P. (2d) 100.

8. *Steadman v. State Highway Commission*, 174 Okl. 308, 50 P. (2d) 657.

9. *Epperson v. Johnson*, 190 Okl. 1, 119 P. (2d) 818; *Smith v. Cleveland C. C. & St. L. R. Co.*, (Ind.) 81 N. E. 501; *Union Pacific R. Co. v. Leavenworth N. & S. R. Co.*, 29 Fed. 728; *In re Rugheimer*, 36 Fed. 369.

10. Title 66, O. S. A., Secs. 52-56; Title 27, O. S. A., Sec. 4.

the district judge of the county in which the land may be situated, shall, upon the application or petition of either party, direct the sheriff of said county to summon three disinterested freeholders, to be selected by said judge from the regular jury list of names as commissioners. The commissioners are required to take an oath to perform their duties impartially and justly. They are required to inspect the land and consider the injury which the owner may sustain by reason of the appropriation of his land, irrespective of any benefits from any improvement proposed, and they are required to forthwith make a report in writing to the clerk of the court, setting forth the quantity, boundaries, and value of the property taken, and amount of injury done to the property, either directly or indirectly, which they assess to the owner. The report of the commissioners may be reviewed by the District Court, on written exceptions filed by either party, in the clerk's office within sixty days after the filing of such report; and the court may make such order therein as right and justice may require, either by confirmation, rejection or by ordering a new appraisal on good cause shown; or either party may within thirty days after the filing of such report file with the clerk a written demand for a trial by jury, and the trial shall be conducted and judgment entered in the same manner as civil actions in the District Court. The statutes do not prescribe what shall be stated in the application or petition and do not require the filing of any answer or other pleading other than the "written exceptions" or a "demand for a trial by jury" provided for under Section 55, Title 66, O. S. A.

This proceeding was instituted on February 17, 1939, in the State court before petitioner obtained its license from the Federal Power Commission on July 26, 1939, retroac-

tive in effect to January 1, 1939. The date of taking under Oklahoma law and stipulation of parties was January 19, 1940. The trial presently involved was had in the State court in April, 1945. The parties have recognized throughout these proceedings the procedure prescribed by statute. The respondent did not file an answer to the petition in condemnation and did not object to the introduction in evidence of petitioner's Federal license on the ground that it was necessary to plead it by amendment of the petition in order to claim the benefits thereof. Both parties filed demands for a trial by jury. The statutory procedure has been followed in the trial in the court of origin and on the appeal to the State Supreme Court.

Section 21 of the Federal Power Act (16 U. S. C. A. 814) provides¹¹ that if any licensee cannot acquire by contract an unimproved dam site, it may acquire the same by the exercise of the right of eminent domain in the District Court of the United States for the district in which such land may be located, *or in the State courts*, provided the amount claimed by the owner of the property to be condemned exceeds \$3,000.00. The Federal Power Act authorized the petitioner to bring and maintain condemnation proceedings in either the State court or the Federal court, and provided that if the proceedings are brought and maintained in the Federal court, the practice and procedure shall conform as nearly as may be to the practice and pro-

11. Sec. 21 of the Federal Power Act provides: "When any licensee cannot acquire by contract or pledges an unimproved dam site . . . necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or necessary thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the District Court of the United States for the district in which such land . . . may be located, *or in the state courts.*"

cedure in similar actions or proceedings in the courts of the State where the property is situated.¹² The commissioners were appointed in the State court on May 31, 1939, and they made their report on July 6, 1939. The respondent filed its demand for a trial by jury on July 15, 1939, and the petitioner on July 29, 1939. All rights of the petitioner under its Federal license were fully effective from and after July 26, 1939, and probably from January 1, 1939, because of the retroactive effect of the order of the Federal Power Commission granting and issuing the license. There is no State statute requiring the condemnor to plead the source of its authority for instituting or maintaining the condemnation proceeding. That is a matter of law which the trial court must take judicial knowledge of, and if on the date of trial the authority exists, the trial court must recognize and apply it, regardless of any allegations of the application or petition, or any amendment thereof.

When this case was tried in the State court, the only issue before the jury was the amount of compensation to be awarded the respondent, and we know of no rule under State procedure which required either party to plead its evidence. The Supreme Court of Oklahoma held in the case of *City of Tulsa v. Creekmore*, 167 Okl. 298, 29 P. (2d) 101, that the landowner, in a condemnation proceeding, was not required to plead the elements of his damage. If the petitioner's Federal license affected the amount of compensation, it was competent evidence regardless of whether it had been specifically pleaded and regardless of whether the proceeding was in a State or Federal court. It was offered in evidence by the petitioner and admitted in evidence by the court without any objection on the part of respondent on the ground that it had not been pleaded.

12. Title 16, U. S. C. A., Sec. 814.

Under local laws of Oklahoma, the right to obstruct the flow of Grand River and utilize the waters thereof for power production is not appurtenant to or a part of riparian lands and does not pass to a grantee under an ordinary conveyance of such lands.

Under the statute law of Oklahoma, water flowing in a definite stream belongs to the public and a riparian owner cannot prevent the natural flow thereof (60 O. S. A. 60), and the right to obstruct such waters and use them for power production can be acquired only through compliance with the Water Code of the State (82 O. S. A., Sec. 1, *et seq.*), as amended by Sections 2 and 3 of the Act of the Oklahoma Legislature, approved January 27, 1927 (S. L. 1927, p. 91). The only right asserted by respondent to so impound and use the waters of the river was that conferred by the State of Oklahoma under the permit issued by the Conservation Commission under and pursuant to the State Water Code. This asserted right cannot be assigned by respondent without the consent of the State (82 O. S. A., Sec. 27). *A conveyance of the dam site by the respondent could not carry with it any right to impound and use the waters for power production and in this proceeding where the petitioner is acquiring the dam site by condemnation, the petitioner does not acquire thereby any right to so impound and use such waters.* The petitioner obtained its right to obstruct the flow of the river in connection with its hydro-electric project from the Federal Government under its license from the Federal Power Commission. The petitioner's license was introduced in evidence to show that the respondent did not have and could not obtain under Federal law the right to obstruct the flow of the stream, and to bar the right of the respondent to recover dam site value under the ruling of the State Supreme Court in this case that "the rule for

the measure of compensation as announced in the *Creekmore* case applies *only* to those adaptable uses to which the condemnee or his ordinary grantee may lawfully place the land."

The respondent concedes and this Court holds that the Grand River is a non-navigable tributary of the Arkansas River which is a navigable water of the United States, and that Congress has exclusive jurisdiction to regulate the flow of the river in the interests of interstate commerce. This jurisdiction has existed since the adoption of the Federal Constitution and was assumed and asserted by the Congress through the Act of September 19, 1890, 26 Stats. L. 454, which provided that:

"The creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction, is hereby prohibited."

Congress, by the Act of March 3, 1899, 30 Stats. L. 1151 (Sec. 403, Title 33, U. S. C. A.), changed the phrase "not affirmatively authorized by law," to "not affirmatively authorized by Congress," after it had been held by this Court in *United States v. Bellingham Bay Boom Co.*, 176 U. S. 211, 44 L. ed. 437, that a log boom constructed in a manner conformable to a State statute at a time when Congress had not assumed jurisdiction over the water in question was "affirmatively authorized by law" within the meaning of the Act of 1890. The Congress, by the enactment of the Federal Water Power Act of June 10, 1920, provided a method for obtaining the consent of Congress to the placing of obstructions in waters over which Congress has jurisdiction under the Commerce Clause without a special act of Congress.

This Court has consistently held ever since the deci-

sion of *United States v. Rio Grande Dam and Irrigation Co.*, 174 U. S. 690, 43 L. ed. 1136, that the obstruction of waters affecting navigable waters of the United States is prohibited by Federal law, unless the consent of Congress is obtained through a special act of Congress or by compliance with the provisions of the Federal Power Act.¹³

This Court, in *United States v. Chandler-Dunbar W. P. Co.*, 229 U. S. 53, 57 L. ed. 1063, said with respect to navigable waters of the United States, that:

“Whatever substantial private property rights exist in the flow of the stream must come from some right which that company has to construct and maintain such works in the river, such as dams, walls, dykes, etc., essential to the utilization of the power of the stream for commercial purposes.”

The prohibition against obstructing the flow of a non-navigable tributary which affects navigable waters of the United States is as full and complete as the prohibition against the obstruction of navigable waters of the United States without the consent of Congress. It follows, therefore, necessarily, that the right to obstruct the flow of Grand River for power production purposes is prohibited unless the consent of Congress is obtained by special act or by compliance with the Federal Water Power Act. *It was therefore incumbent upon the respondent to affirmatively show that it had the right under Federal law to obstruct the flow of Grand River and utilize its waters for power production in order to obtain consideration of the adaptability of its dam site/lands for dam site purposes under the*

13. *United States v. Rio Grande Dam and Irrigation Co.*, 174 U. S. 690, 43 L. ed. 1136; *Sanitary District of Chicago v. United States*, 266 U. S. 405, 69 L. ed. 352; *United States v. Appalachian Electric Power Co.*, 311 U. S. 377, 85 L. ed. 243; *Oklahoma, ex rel. Phillips, v. Guy F. Atkinson Co.*, 313 U. S. 508, 85 L. ed. 1487; *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U. S. 152, 90 L. ed. 1143.

ruling of the State Supreme Court in this case. Under Federal law, the respondent could obtain the right to obstruct the flow of the river only through compliance with the Federal Power Act by filing a Declaration of Intention to construct its project, setting out, as required by the Federal Power Act, the details of its proposed structure, including the location thereof, and securing from the Federal Power Commission either a finding that its proposed structure would not affect interstate commerce, or, if the Commission's finding was to the contrary, obtaining a license from the Federal Power Commission to construct and operate its project.

The Court erroneously affirmed the judgment of the Oklahoma Supreme Court recognizing and allowing respondent water-power value and did not give proper consideration to or protect the rights of petitioner under its Federal license.

There are certain dates and facts in this case which should not be forgotten or ignored. The date of taking was January 19, 1940. At that time the petitioner held a fifty-year license from the Federal Power Commission under Federal law to construct and operate a hydro-electric project on Grand River at the location of the respondent's land. The respondent had not complied with any provisions of the Federal Power Act and had no authority under Federal law to construct or operate a hydro-electric project on the river. The market value of the land must be determined as of the date of taking, January 19, 1940. The respondent was incorporated November 6, 1929. Its State permit was issued by the Conservation Commission of Oklahoma on August 29, 1931. The petitioner was created by an Act of the Oklahoma Legislature, effective July 29, 1935. The respondent acquired the lands involved in 1929 and

1930. Neither the petitioner nor respondent is responsible for Congress assuming exclusive jurisdiction over the flow of Grand River in the interests of interstate commerce. The fact remains; however, that Congress has assumed such jurisdiction under the Act of March 3, 1899, and the Federal Water Power Act of June 10, 1920, as amended by the Federal Power Act of August 26, 1935. The respondent has no right to use the flow of the river for power production by virtue of its ownership of the riparian lands. Any complete right to utilize such waters for that purpose must come from some right to build and maintain in the river structures essential for that purpose. Such right can *only* be obtained from the Federal Government through compliance with the Federal Power Act. The respondent could not use the lands as a site for a hydro-electric project and could not obtain such right on the date of taking. Under these circumstances, what consideration would a prospective ordinary purchaser or grantee give to the adaptability of these lands as a site for a dam for power production? Such purchaser or grantee could not use the lands as a site for such a project and could not obtain such right at the time the land was taken by petitioner, except by assignment from petitioner with the written approval of the Federal Power Commission.

It is inconceivable that such a purchaser or grantee would give any consideration to water-power value or buy this land at any price which reflected water-power value, and most assuredly not \$800,000.00. Such a purchaser or grantee naturally would inquire *first*, whether or not a conveyance of the land would pass and include the right to use the land for such purpose; *second*, whether or not the owner of the land had a vested right to use it for that purpose and could transfer it to the purchaser along with the

land, and, *third*, whether or not the right to use it for that purpose was vested in someone else and could be acquired from such source. In order to accomplish the utilization of the land for a dam site for a hydro-electric project, the purchaser would be confronted with the necessity of acquiring the land from its owner and then, in addition thereto, acquiring the right to use the land for the purpose desired from whoever had the right to use it for such purpose.

This case was tried on the theory that the respondent had the right to use the land for a dam site by virtue of its State permit and the trial court instructed the jury under the Court's Instruction No. 10, that in fixing just compensation the jury should put out of consideration entirely the fact that respondent was not possessed of a license from the Federal Power Commission authorizing it to appropriate the waters of Grand River for such use (R. 623), and refused to instruct the jury as to the applicable State law as requested in petitioner's Requested Instruction No. 21 (R. 602), and as to the applicable Federal law as requested in petitioner's Requested Instruction No. 33 (R. 607), and refused to permit counsel for petitioner to argue to the jury the right of the respondent to use its lands for dam site purposes or the probability of the respondent making such use of its lands within a reasonable time. If the intervention of Federal law did not destroy entirely the value of these lands for dam site purposes, as this Court seems to hold, the value of the lands for dam site purposes was unquestionably affected and materially reduced because of such intervention, for the reason that the use of the waters of the river was expressly prohibited by such laws without compliance with the Federal Power Act, and the jury should have had before it not only the facts existing at the time of the taking but should have been advised as to both the

State and Federal laws affecting the right to so use these lands.

The expert witnesses for the respondent were allowed to testify as to the market value of the dam site lands for dam site purposes without taking into consideration the fact that respondent had not complied with the Federal Power Act or obtained a Federal license to use its lands for that purpose, and the fact that petitioner had already acquired under Federal law the exclusive right to use the lands for that purpose for a period of fifty years. Unquestionably, compensation has been determined in this case by the jury without knowing what either the Federal or State laws provide with respect to acquiring the right to use the lands for dam site purposes. It is the duty of the court to instruct the jury as to the law and it is the duty of the court, even though a State court, to recognize and apply applicable Federal laws. They are just as binding on citizens and courts of the States as the State laws are.¹⁴ Furthermore Clause 2 of Article 6 of the Federal Constitution provides that the Constitution and laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding. These are matters which must be taken into consideration even under this Court's view of the theory on which the State Supreme Court decided this case, and the failure to take them into consideration has materially impaired the rights of the petitioner under its license from the Federal Power Commission issued pursuant to the Federal Power Act. The effect of this Court's affirmance of the decision of the State Supreme Court is to

14. *Claffin v. Housman*, 93 U. S. 130, 23 L. ed. 833; *Hines v. Lowery*, 305 U. S. 85, 83 L. ed. 56.

recognize and allow the respondent the value of the right to use the waters of Grand River at the Pensacola site for the production of power which the Federal Government had granted to the petitioner under its license issued pursuant to the Federal Power Act, thus taking away from the petitioner a value owned by it under Federal law and giving it to the respondent, who had no right to use the waters for such purpose. These rights of the petitioner have not been given proper consideration or protection at any stage of these proceedings, although they are vital vested rights under existing Federal law.

The statement of this Court that the Supreme Court of Oklahoma, both in its opinion on the first and second appeals, "holds that it was enough, for the present purposes, that the use of the land for a dam site was a reasonable and lawful use to which the land might be applied, without showing that the respondent itself held a permit or license authorizing it to build the dam," is erroneous. The Supreme Court of Oklahoma did not hold on the first or second appeal that "the use of the land for a dam site was a reasonable and lawful use to which the land might be applied, without showing that the respondent itself held a permit or license authorizing it to build the dam." On the contrary, the State Supreme Court held that adaptability of the land for dam site purposes could not be considered unless the respondent or its ordinary grantee had the right to use the land for that purpose, and that the respondent had a valid permit from the State under which it was authorized to use the land for a dam site. The effect of this holding by the State court is tantamount to saying that the State permit was valid and effective either under or regardless of the Federal Water Power Act which authorized the building of the dam by respondent.

Later in the Court's opinion, it is said:

"It may be surmised that the Supreme Court of Oklahoma, in approving the admission of the testimony by the trial court, also treated the petitioner as being the respondent's 'ordinary grantee' of the title to this land."

It suffices to say in this regard that the petitioner was not the grantee or the ordinary grantee of the respondent as to the dam site lands involved. They were acquired by condemnation, and not by grant, with the exception that two tracts, one containing 45 acres and the other 10 acres, on which the auxiliary spillways were located, a mile east of the east end of the dam site, were conveyed to the petitioner by the respondent, subject to the determination of the consideration by condemnation if an agreement as to consideration could not be reached. As to the meaning of "ordinary grantee," it would appear that the court considered an ordinary grantee to be a grantee in an ordinary deed of conveyance at a free sale. The court used the term in connection with its qualification of the rule for the measurement of damages announced in the *Creekmore* case from which the Supreme Court had quoted.

While the Federal Power Act may not have placed any limitation upon the voluntary negotiations between the petitioner and respondent, it must, of necessity, have had a dynamic effect upon such negotiations. Certainly, the petitioner would not willingly pay the respondent any consideration for the right of use of the waters of the river it acquired from the Federal Government under its license from the Federal Power Commission.

The Court further says:

"The present proceeding is in substance a part

of their original agreement for the sale of the land by the respondent to the petitioner."

There was never at any time any agreement between the respondent and the petitioner for the sale of the dam site lands. The negotiations for the purchase of the dam site lands were consummated and the petitioner was forced to acquire them by condemnation in this case. The 55 acres conveyed by respondent to the petitioner are no part of the dam site and are located a mile east of the dam site beyond the Town of Disney.

It is submitted that this Court has misunderstood many vital facts in this case and has misconstrued the theory on which the State Supreme Court decided this case, and has failed to give proper consideration and protection to the vested rights of the petitioner acquired under its license from the Federal Power Commission.

We therefore respectfully ask the Court to grant a rehearing in this case and on the rehearing to withdraw its opinion of November 22, 1948, and reverse the case for further proceeding, and pending action on this petition for rehearing, to stay the issuance of the mandate to the Supreme Court of Oklahoma.

QUINCE B. BOYDSTUN,
Vinita, Oklahoma,
DELMAS E. MARTIN,
ROBERT LEANDER DAVIDSON,
Tulsa, Oklahoma,
Attorneys for Petitioner.

The undersigned attorney of record for the petitioner hereby certifies that the foregoing petition for rehearing is filed in good faith and not for delay.

Dated this 4th day of December, 1948.

ROBERT LEANDER DAVIDSON,
Tulsa, Oklahoma,
Attorney for Petitioner.

